

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-495

INVESTORS DIVERSIFIED SERVICES, INC., INVESTORS VARIABLE PAYMENT FUND, INC., and IDS NEW DIMENSIONS FUND, INC.,
Petitioners,

v.

JACOB SCHEIN and MARVIN H. SCHEIN,
Respondents.

INVESTORS DIVERSIFIED SERVICES, INC.,
Petitioner,

v.

ANTONE F. GREGORIO
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAMES V. HAYES
30 Rockefeller Plaza
New York, New York 10020
Counsel for Petitioners

Of counsel:

MAHLON F. PERKINS, JR.
ALLAN R. FREEDMAN
DAVID A. CUTNER
DONOVAN LEISURE NEWTON & IRVINE

September 17, 1973

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The petitioners, Investors Diversified Services, Inc., Investors Variable Payment Fund, Inc., and IDS New Dimensions Fund, Inc., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on May 10, 1973.

Opinions Below

The opinion of the Court of Appeals, reported at 478 F.2d 817, and the opinion of the District Court, reported at 335 F. Supp. 329, appear in the Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on May 10, 1973. A timely petition for rehearing with a suggestion for rehearing *in banc* was denied on June 18, 1973, and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Did the Court of Appeals exceed the constitutional limitations expounded in *Erie R.R. Co.* v. *Tompkins,* 304 U.S. 64 (1938), by holding, in this diversity case governed by Florida law, that a Florida corporation has a common law right of action for profits made by a non-fiduciary "tippee" in selling the corporation's stock on the basis of material, non-public information, when no such common law right is known to the law of Florida or any other state?

2. May a federal court of appeals decide an important and controlling question of state law, for which admittedly no precedent or authority remotely in point can be found, without certifying the question to the highest court of the state when the state has made a procedure available for such occasions?

Constitutional Provision Involved

Constitution of the United States, Amendment X

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Statutory Provision Involved

Florida Annotated Statutes

"§ 25.031

Supreme court authorized to receive and answer certificates as to state laws from federal appellate courts.

The supreme court of this state may, by rule of court, provide that, when it shall appear to the supreme court of the United States, to any circuit court of appeals of the United States, or to the court of appeals of the District of Columbia, that there are involved in any proceeding before it questions or propositions of the laws of this state, which are determinative of the said cause, and there are no clear controlling precedents in the decisions of the supreme court of this state, such federal appellate court may certify such questions or propositions of the laws of this state to the supreme court of this state for instructions concerning such questions or propositions of state law, which certificate the supreme court of this state, by written opinion, may answer."

Statement of the Case

Respondents Jacob and Marvin H. Schein and Antone F. Gregorio, brought these actions derivatively on behalf of Lum's, Inc., ("Lum's"), a Florida corporation engaged in the fast-food franchising business. Named as defendants

were Melvin Chasen, Lum's chief executive officer; the brokerage firm of Lehman Brothers and one of its registered representatives, Benjamin Simon;[1] Investors Diversified Services, Inc. ("IDS"), and two mutual funds advised by IDS[2] and their portfolio managers, Eugene Sit and James Jundt. The complaints, pending in the United States District Court for the Southern District of New York,[3] assert no claim under federal law. Jurisdiction was founded upon diversity of citizenship. The parties now agree that Florida law governs.

The complaints allege, in summary, that on or about January 5, 1970, Chasen, Lum's chief executive officer, learned that the company's earnings for fiscal 1970 would be $0.76 per share rather than the figure of approximately $1.00 to $1.10 per share which Chasen had announced in November of 1969. On or about January 8, 1970, and prior to any public announcement, Chasen telephoned Simon at Lehman Brothers and imparted this information. Simon immediately called Sit, the portfolio manager of IDS New Dimensions Fund, and passed on the news. Sit disclosed the information to Jundt, a portfolio manager of Investors Variable Payment Fund, and on January 9, 1970, the two portfolio managers caused their respective mutual funds to sell a total of 83,000 shares of Lum's common stock at approximately $17.50 per share. Later that day, the New York Stock Exchange halted trading in Lum's stock pending an announcement from the company as to its projected earnings. When trading resumed on January 12, 1970, the opening price was $14.00 per share. (*Schein* Complaint ¶¶ 16-24; *Gregorio* Amended Complaint ¶ 13-20).

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[1] Mr. Simon is not not named as a defendant in the *Gregorio* action.

[2] The two mutual funds are not named as defendants in the *Gregorio* action.

[3] The *Gregorio* action, commenced in the Northern District of Illlinois, was transferred to the Southern District of New York on consent.

In the *Schein* case, respondents assert that petitioners "are liable to Lum's for their unlawful profits (including commissions) and are liable to Lum's for the damages it sustained thereby." (Schein Complaint ¶ 25) In the *Gregorio* case, respondent seeks to require petitioners to account to Lum's for their profits, but does not allege that Lum's sustained any damages by reason of the acts complained of. (*Gregorio* Amended Complaint ¶ 22)

Petitioners moved to dismiss the complaint under Rule 12(b)(6), F.R.C.P., for failure to state a claim upon which relief could be granted under the applicable Florida law. Respondents urged that their complaints be tested under New York law, rather than Florida law, and specifically under a recent decision of the New York Court of Appeals, *Diamond* v. *Oreamuno,* 24 N.Y.2d 494, 301 N.Y.S. 2d 78 (1969). The District Court ruled that Florida law applied but nevertheless considered whether the complaints stated a claim under *Diamond* "because of the possibility that the *Diamond* rationale might be followed in Florida." In holding that *Diamond* did not afford any basis for a claim, the court said:

> "It is clear that the complaints in these actions go far beyond the narrow holding of *Diamond.* In that case, the New York Court of Appeals held that a corporate fiduciary is liable for profits which he realizes from a sale of stock motivated by inside information received by him in his corporate position. None of the defendants in these actions fit into this mold.
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> • • •
>
> "As Chief Judge Fuld explained, the purpose of that derivative action was to allow individual shareholders to be '. . . "private Attorney General[s]" to . . . enforce proper behavior on the part of corporate officials.' Diamond *v.* Oreamuno, *supra,* at 503, 301 N.Y.S. 2d at 85, 248 N.E.2d at 915. It is implicit that the jurisdiction of these 'private attorney generals' would be limited to the corporation in which they are

shareholders. It could not, with any logic, be extended in a derivative action to cover outside individuals, corporations, or institutions who are subject to other private and governmental restraints on their behavior. Furthermore, in affirming the dismissal of the *Diamond* complaint against other board members who were alleged to have aided the defendants in concealing their activities, the New York Court of Appeals made it quite clear that *Diamond* extends only to corporate fiduciaries who actually profit by inside information and does not cover aiders and abettors and/or conspirators. In view of the fact that the New York Court of Appeals could not bring itself to find liability for inter-corporate conspirators, I fail to perceive how this court could extend *Diamond* to cover extra-corporate conspirators and tippees. Accordingly, I conclude that with regard to all defendants save Chasen, the complaints herein fail to state a claim for which relief can be granted." (335 F. Supp. at 333-34, Appendix at 5A-7A)

The District Court thereupon dismissed the complaints.

The Court of Appeals for the Second Circuit reversed, Judge Kaufman dissenting. Noting respondents' concession that Florida law governed but contained no cases in point, the Court first satisfied itself that "the Florida court has never faced the precise issues which are present in this action." (478 F.2d at 820, 821, Appendix at 17A.) It then proceeded to "turn for guidance" to the *Diamond* case, and purporting to 'view the case as the Florida court would probably view it,' ruled that the "stretch" of *Diamond* reached the defendants in this case. (478 F.2d at 821, 822, Appendix at 19A-20A.)

In his dissent Judge Kaufman pointed out that *Diamond* was grounded solely upon the breach of a fiduciary duty owed to a corporation by its officers and directors and that no such fiduciary relationship existed between Lum's and

petitioners. He concluded that "the court exceeds its authority by substituting its own view of what [New York] state law ought to be, for what the state law actually is," an excess of authority compounded by its speculation that the Florida Supreme Court "would look to a New York decision and, in addition, would give an unprecedented expansive reading to that case." (478 F.2d at 828, Appendix at 30A-31A.)

Finally, Judge Kaufman could not comprehend why his brothers refused to utilize Florida's certified question statute, Fla. Stat. Ann. §25.031.

> "The uncertainty inherent in the majority's speculation over what the Florida courts would decide if faced with this novel question of tippee liability under state common law fiduciary principles in a stockholders' derivative action would be dispelled authoritatively and finally." (*Ibid.*, Appendix at 32A)

REASONS FOR GRANTING THE WRIT

I

In deciding this case the Court of Appeals transgressed the constitutional boundaries of federal judicial power.

Under *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), which commands the federal courts to recognize and preserve the autonomy and independence of the States in obedience to the Constitution, it was the duty of the Court of Appeals to ascertain the law of Florida and apply it to the facts of this case. It made no real effort to do so. Instead, seizing upon and improperly extending a single, novel decision of the New York Court of Appeals, it fashioned out of whole cloth a new remedy for violation of the federal securities laws which relate to insider trading.

All of this is apparent from the face of the opinion, which does not evidence any genuine concern for the law or policy of Florida.

The majority describes its investigation into Florida law as a "foray." (478 F.2d at 821, Appendix at 17A) The word is apt. It cites only two Florida cases: *Quinn* v. *Phipps*, 93 Fla. 805, 113 So. 419 (1927) and *Palma* v. *Zerby*, 189 So. 2d 510 (Fla. App. 1966), cert. denied, 200 So. 2d 814 (Fla. 1967). It dismisses the latter as a per curiam opinion of a lower Florida court. (478 F.2d at 824, fn. 9, Appendix at 23A) *Quinn* v. *Phipps* is cited for the proposition that the concept of a fiduciary under Florida law extends not only to "technical fiduciaries" but to others who became "fiduciaries" through the acquisition of confidential information which is owned by someone else. (*Id.* at 823, Appendix at 21A) But *Quinn* v. *Phipps*, which concerns the liability of a real estate broker who purchased property for himself instead of the client on whose behalf he had agreed to transmit an offer, involves no more than a run-of-the-mill breach of the fiduciary duty owed by an agent to his principal.

There is no discussion in the opinion of the Florida law respecting the rights of corporations and the obligations of their directors and officers, the willingness or not of the Florida court to create new common-law remedies without statutory basis, the degree of its concern with problems of insider trading in securities, the extent to which it looks to the law of New York in cases without Florida precedent, or any other subject that might give some clue as to how "the Florida court would probably view" the case. The nod to *Erie* is perfunctory. With all due respect, it must be said that the majority opinion displays an extraordinary lack of sensitivity to the law and policy of Florida.

By contrast, the opinion is replete with federal law and policy. No less than 25 federal cases are cited, a large

number of them dealing with liability under the antifraud provisions of the federal securities laws. The court praises *Diamond's* "prophylactic effect of providing a disincentive to insider trading" (478 F.2d at 823, Appendix at 20A) and relies on the expression in numerous federal cases of a policy of "[p]reventing those who are privy to confidential inside information from using it to their own advantage." (*Id.* at 825, Appendix at 24A.)

It is plain beyond peradventure, we respectfully submit, that the Court of Appeals, ignoring Florida law, has taken the opportunity provided by this case to announce, in effect, a new rule of federal common law in support of the policy of the federal securities laws. Such a course is forbidden by *Erie,* in which Mr. Justice Brandeis said:

> "There is no federal general common law. Congress has no power to declare substantive rules of common law applicable to a state whether they be local in their nature or "general," be they commercial law or part of the law of torts." And no clause in the Constitution purports to confer such a power upon the federal courts." 304 U.S. at 78.

cf. *West* v. *American Telephone & Telegraph Co.,* 311 U.S. 223 (1940).

Even in treating New York law, the court may have exceeded what is permissible under *Erie.* It looked at only one New York case, *Diamond,* which the New York Court of Appeals itself recognized to be one of first impression, 24 N.Y. 2d at 496, 301 N.Y. Supp. 2d at 79. *Diamond* held, simply, that corporate officers and directors who profit from using inside information to trade in their corporation's securities have wrongfully exploited a corporate asset for their personal benefit and must, as fiduciaries of the corporation, surrender their profits to it. The legal basis for imposing such liability rests on violation of the fiduciary obligation that an officer or director owes to his corpora-

tion. The policy reason for imposing it, even though the corporation could not lawfully have profited itself from use of the inside information, stems from its deterrent effect and the interest of the corporation in preserving its good name.

> "When officers and directors abuse their position in order to gain personal profits, the effect may be to cast a cloud on the corporation's name, injure stockholder relations and undermine public regard for the corporation's securities." 24 NY 2d at 499, 301 N.Y. Supp. 2d at 82.

Thus, in creating a new common-law remedy for New York corporations, the New York court built upon principles of the law of fiduciaries in order to vindicate what it regarded as a significant corporate interest.

In "stretching" *Diamond* to require remote "tippees" to make over their profits to the corporation, the court below abandoned the rationale of *Diamond* and overlooked the limitations established by the New York court in refusing to extend *Diamond* liability to officers and directors who approved, acquiesced in or ratified the insider transactions. (See Judge Kaufman's dissenting opinion, 478 F.2d at 827, fn. 3, Appendix at 29A) Petitioners were not officers or directors of Lums. They had no relationship of any kind with Lums, let alone a fiduciary relationship, other than (in the case of the mutual funds only) owning some of its shares. Thus the legal basis of *Diamond* is non-existent. Nor can it be argued seriously that their use of inside information to sell Lum shares injured its good name. Thus there is no corporate interest to be vindicated. Plainly, *Diamond* does not justify the "stretch", and the court below cited no other New York case.

Nevertheless, the court below assumed not only that the Supreme Court of Florida would follow *Diamond,* a unique case of first impression, and create a new common-law liabil-

ity for directors and officers of Florida corporations, but would go on to "stretch" *Diamond* beyond its rationale and stated limitations by resorting to the "tortured reasoning" (Appendix at 25A) of the majority opinion. Nothing in that opinion suggests why the Supreme Court of Florida would do any such thing.

In the absence of any indication whatsoever that the Florida court would fashion a new common-law rule without precedent in Florida or any other jurisdiction, it was the clear duty of the Court of Appeals either to dismiss the complaints for failure to state a claim under Florida law or to certify the question to the Supreme Court of Florida under the procedure authorized by Florida statute. (Fla. Ann. Stat. 25.031) For the Florida certification statute expresses a clear Florida preference that the federal appellate courts abstain from attempting to pronounce on Florida law where there are no clear controlling precedents. No other course would comport with *Erie*.

II

The refusal of the Court of Appeals to avail itself of the Florida certification procedure conflicts with decisions in other circuits.

There can be no real doubt that if the important question controlling this case had been presented to the Court of Appeals for the Fifth Circuit, that court would have certified it to the Supreme Court of Florida and obtained an authoritative determination binding not just in the Fifth Circuit but in the Second Circuit and every other federal jurisdiction where the question might arise. Such certification has been the uniform and successful practice in the Fifth Circuit ever since 1960, when this Court, in *Clay* v. *Sun Insurance Office*, 363 U.S. 207 (1960) ordered certifica-

tion of questions of Florida insurance law even though the only judge to rule on the local law question was experienced in Florida law and had been supported in his interpretation by the Florida Attorney-General.*

The occasions on which the Fifth Circuit has taken advantage of the Florida certification procedures are detailed in *Boyd* v. *Bowman,* 455, F. 2d 927, n. 1 (5th Cir. 1972). It has repeatedly lavished praise on the procedure, *e.g.,* in *Martinez* v. *Rodriquez,* 410 F. 2d 729 (5th Cir. 1969), where the court said:

> "We would be remiss if we did not once again seize the opportunity to extol the virtues of the Florida certification procedure. For example, while this Court following the footsteps of the stalwarts below might have reached the same conclusion as that of the Florida Court with respect to the issue in this case, our decision would have had no assurance of predictable correctness. No matter how many Federal Judges, trial, appellate, three-Judge panel, or the full panoply of the court en banc, any decision would have been an *Erie*-guess. Now the guesswork has been eliminated, and we are quickly presented with a definitive explication of Florida law." (410 F. 2d at 730)

It is noteworthy that the Fifth Circuit relies on certification of doubtful questions even though its judges may be presumed to have a familiarity with Florida law and judicial policy far greater than judges of the Second Circuit. For, as the Fifth Circuit acknowledges, it has been "saved from numerous wrong guesses." *Id.* at 731, fn. 5. The Florida court has rejected the Fifth Circuit's interpretation

* Other Circuits have also used a State certification procedure. See, *e.g., Ford* v. *Black Mountain Tramways, Inc.,* 110 N.H. 20, 259 A. 2d 129 (1969). District Courts in a number of Circuits have certified questions where the State law makes certification available to the lower federal courts. See, *e.g., Pierce* v. *Secretary of U.S. Dept. of Health, Ed. & Welf.,* 302 F. Supp. 508 (D. Me. 1969)

of Florida law in cases where it did not resort to certification. Compare, for example, *Emerson* v. *Holloway Concrete Prod. Co.*, 292 F.2d 271, 275 (5th Cir. 1960) with *Weed* v. *Bilbrey*, 201 So. 2d 771, 774 (2d D.C.A. Fla. 1967). A score sheet of State court rejections of federal court decisions as of 1967 was supplied by Judge Brown in his dissent in *W. S. Ranch Co.* v. *Kaiser Steel Corp.*, 388 F.2d 257, 264-65 and fns. (10th Cir. 1967), *rev'd*, 391 U.S. 593 (1968).

The value of certification resides, of course, not only in preventing the rejections that do occur but perhaps even more in avoiding the possibility that rejection will occur and thereby removing the uncertainty and confusion that must prevail until the State court of last resort has had an opportunity to speak.

The route of certification provides an easy and satisfactory resolution of the recurring conflict between the duty of a federal court to adjudicate with reasonable dispatch every case in which its jurisdiction has been properly invoked and the undesirability of its attempting to predict State law, particularly in areas that impinge on important State policy, when the State precedents are cloudy, conflicting or, as here, altogether lacking. *Meredith* v. *Winter Haven*, 320 U.S. 228 (1943), in which this Court condemned the Fifth Circuit's dismissal of a complaint without prejudice to proceeding in the State court because the law of Florida applicable to the validity of a municipal bond issue was not clearly settled, represents one pole of the conflict. This Court there, with two dissents, came down hard on the duty of federal courts to decide questions of State law

> "when necessary for the disposition of a case brought to it for decision, although the highest court of the state had not answered them, the answers were difficult and the character of the answers which the highest state courts might ultimately give remained uncertain." (320 U.S. at 237-38)

The other pole is represented by a series of cases in which this Court has commanded abstention by the lower federal court pending determination of the State law question in a State court proceeding, pending or to be brought.

In *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941), this Court reversed an injunction granted by the federal district court against an order of the Texas Railroad Commission and remanded the case with instructions to retain the complainant's bill pending the determination of proceedings to be brought with reasonable promptness in the state court to determine whether the Commission's order was lawful. Mr. Justice Frankfurter noted that "no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination" and that "the last word . . . belongs neither to us nor to the district court but to the supreme court of Texas." There, abstention avoided the "needless friction with state policies" that might result from a tentative construction of a state statute as well as the "friction of a premature constitutional adjudication." (312 U.S. at 499-500)

In *Louisiana P. & L. Co.* v. *Thibodaux City*, 360 U.S. 25 (1959), over the vigorous dissent of three justices who maintained that the decision was squarely contrary to *Meredith*, this Court directed abstention in order to permit the Supreme Court of Louisiana to interpret an eminent domain statute. Holding that this course did not constitute an abrogation of judicial duty but a wise and productive discharge of it, the Court said:

> "We have increasingly recognized the wisdom of staying actions in the federal courts pending determination by a state court of decisive issues of state law." (360 U.S. at 27)

More recently, in *Kaiser Steel Corp.* v. *W. S. Ranch Co.*, 391 U.S. 593 (1968), abstention was ordered *per curiam* in a

suit for trespass in order to obtain a New Mexico determination of the law relating to water rights in that state:

> "Sound judicial administration requires that the parties in this case be given the benefit of the same rule of law which will apply to all other businesses and landowners connected with the use of this vital state resource." (391 U.S. at 594)

While it is apparent that this Court has been sympathetic to abstention in a range of cases extending well beyond avoidance of premature constitutional adjudication and needless friction with state policy, it remains true that, in view of its drawbacks, abstention requires justification by special circumstances which must be considered on an *ad hoc* basis. The drawbacks of abstention do not exist under certification. Under certification there is no relinquishment of diversity jurisdiction and hence no conflict with *Meredith*. The federal court remains in control of the case, deciding all issues of fact and framing the questions of law. Nor are the delay and added expense to litigants which inevitably accompany abstention a feature of certification. The Fifth Circuit has vouched for the promptness with which its questions are answered by the Florida Supreme Court. The six months' wait noted by the Fifth Circuit in *Martinez* v. *Rodriquez*, 410 F.2d at 731, fn. 7, may be compared with the seven months that elapsed between argument and decision in this case. By relieving the federal court from wrestling with questions of state law which are definitively unanswerable by it, certification may well speed up the decisional process.

The Fifth Circuit experience has tested and proven the practicability and value of the Florida certification procedure. Since *Clay, Supra*, p. 11, this Court has twice directed its use on its own initiative. *Dresner* v. *City of Tallahassee*, 375 U.S. 136 (1963); *Aldrich* v. *Aldrich*, 375

U.S. 249 (1963). Certification procedures, though less frequently availed of, exist in a number of other states.* Appropriate action by this Court would undoubtedly stimulate the use of such other state procedures and lead to their enactment by other States.

We therefore respectfully submit that, as a matter of sound judicial administration, it should be incumbent on the federal courts, where a certification procedure has been made available by a state, to make use of that procedure to obtain authoritative answers to significant questions of state law for which no clear precedent can be found. In any event, it was incumbent upon the court below to certify the question before it to the Florida Supreme Court, as the Fifth Circuit would have done, rather than to indulge in unfounded assumptions as to how the Florida court would act and, in effect create new federal common law.

The simple fact is that no one knows or can know whether the decision of the court below is in accord with the law of Florida. Only the Florida Supreme Court can answer that question. Under the Florida statute that court was prepared to do so. The failure of the court below to follow the Florida certification route, which would enable it to learn the substantive law of Florida, is nothing more or less than a rejection by it of *Erie*.

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* Colorado—Rule 21.1, Appellate Rules; Hawaii Rev. Stat. § 602.36; Maine Rev. Stat. Ann., Tit. 4, § 57; Montana—Rule 1, Rules of the Montana Supreme Court; New Hampshire Rev. Stat. Ann. § 490; Washington Rev. Code Ann. § 2.60

CONCLUSION

For these reasons, this petition for a writ of certiorari should be granted.

September 17, 1973

Respectfully submitted,

JAMES V. HAYES
30 Rockefeller Plaza
New York, New York 10020
Counsel for Petitioners

Of counsel:
MAHLON F. PERKINS, JR.
ALLAN R. FREEDMAN
DAVID A. CUTNER
DONOVAN LEISURE NEWTON & IRVINE

APPENDIX

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Nos. 70 Civ. 5733, 71 Civ. 1925 and 4218

JOSEPH GILDENHORN, as Guardian for Carol Ann Gildenhorn,

Plaintiff,

v.

LUM'S INC., *et al.*,

Defendants.

ANTONE F. GREGORIO,

Plaintiff,

v.

LUM'S INC., *et al.*,

Defendants.

JACOB SCHEIN and MARVIN H. SCHEIN,

Plaintiffs,

v.

MELVIN CHASEN *et al.*,

Defendants.

December 15, 1971.

TYLER, *District Judge*

Defendants in these consolidated actions have moved to dismiss plaintiffs' complaints upon the ground that they fail to state a claim upon which relief can be granted. Rule 12(b) (6) F.R. Civ.P. Alternatively, all defendants move this court to stay these actions pending a final determina-

tion in *Sanders* v. *Lum's Inc. et al.*, 70 Civ. 5331, a related action pending before this court. Additionally, the individual defendants move that the complaints be dismissed as against them upon the ground that jurisdiction over their persons has not been obtained. Rules 4(e) and 12(b)(2), F.R.Civ.P.[1]

All three of these suits are derivative actions brought on behalf of Lum's Inc. ("Lum's"), a Florida corporation. Jurisdiction is claimed by virtue of diversity of citizenship. The plaintiffs' complaints are predicated on the same facts as *S.E.C.* v. *Lum's et al.*, 70 Civ. 5280, which is also pending before this court. Briefly stated, plaintiffs' claims are based on defendants' alleged misuse of confidential corporate information. The complaints charge that defendant Melvin E. Chasen, aware as president of Lum's that the firm's 1969 earnings would be lower than had been projected, telephoned from his Florida office to defendant Simon, who is employed in the Chicago, Illinois office of defendant Lehman Brothers, Inc., and told him of the earnings' decline. Simon then transmitted the information to Sit, the portfolio manager at defendant IDS New Dimensions Fund ("Dimensions"), whose offices are in Minneapolis, Minnesota. Sit then conveyed the information to defendant Jundt, a manager and analyst for IDS Variable Payment Fund ("Variable"). It is further alleged that Sit and Jundt then caused Variable and Dimensions to sell their entire holdings in Lum's just before the public announcement of the decline in the 1969 earnings caused the stock to drop several points in trading on the New York Stock Exchange.

1. Defendants Sit and Jundt, apparently unaware that I have already granted their prior motions to dismiss by order dated October 25 of this year, once again seek the same relief. As they are no longer defendants in any of these actions, their applications will not be considered.

Plaintiffs make no argument that any of the federal securities acts would support a claim under the facts of this case. They do argue, however, that a claim for which relief can be granted can be made out under the recent decision of the New York Court of Appeals in *Diamond* v. *Oreamuno*, 24 N.Y.2d 494, 301 N.Y.S.2d 78, 248 N.E.2d 910 (1969). Briefly stated, that case held that corporate officers who learn of a drop in corporate earnings by virtue of their fiduciary positions and sell their shares of corporate stock before publishing information as to the loss will be liable to the corporation for any profits made thereby. Plaintiffs urge that Chasen be found liable under *Diamond* even though it is not alleged that he sold any Lum's stock belonging to him and that the remaining defendants be so held under either a "tippee" or general conspiracy theory.

Three issues, thus, are presented to this court by these motions, the first being a choice of law problem. The defendants argue that under the applicable choice of law provisions, these cases should be decided by Florida law. Plaintiffs oppose and urge that their complaints be tested by New York law in general and by *Diamond* v. *Oreamuno, supra*, in particular. Assuming that *Diamond* would apply, this court would then have to determine whether the complaints herein can state a claim under the holding of that case. Finally, it must be decided whether the activities of the individual defendants fall within any of the provisions of the New York long-arm statute, CPLR § 302(a), so as to allow out of state service to be effected upon them pursuant to CPLR § 313.

In actions where jurisdiction is predicated on diversity of citizenship, this court must apply the choice of law rules of the State of New York. *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). New York follows the general choice of law principle that the law of the state of incorporation governs the existence

and extent of corporate fiduciary obligations as well as the liability for violations of such obligations. *Hausman* v. *Buckley*, 299 F.2d 696, 703 (2d Cir., 1962) and cases cited therein; *Norte & Co.* v. *Huffines*, 304 F.Supp. 1096, 1110 n.6 (S.D.N.Y., 1968). This rule was expressed in *Diamond* itself when the court stated that as regards the ". . . duties and obligations of directors and officers and their relation to the corporation and its shareholders . . . [t]he primary source of the law in this area ever remains that of the State which created the corporation." *Diamond* v. *Oreamuno, supra*, at 503, 504, 301 N.Y.S.2d at 85, 248 N.E.2d at 915.

The same result would be reached by the "grouping of contacts" approach to choice of law in tort actions as enunciated in *Babcock* v. *Jackson*, 12 N.Y.2d 473, 240 N.Y.S.2d 743, 191 N.E.2d 279 (1963). Under this approach, a New York court will apply the law of the state of the "strongest contacts with the cause of action." *Stockwell* v. *Reynolds & Co.*, 252 F.Supp. 215, 220 n.3 (S. D.N.Y., 1965). It appears from the pleadings that this case centers in Florida rather than in New York. Chasen, a Florida citizen, allegedly received and communicated the information from Florida. Lum's was incorporated, headquartered, and, at least theoretically, damaged in Florida. Most of the other contacts appear to be scattered about the midwest, the only contact with New York being several transactions over the New York Stock Exchange. Additionally, a New York court would give more weight to the Florida contacts under the "governmental interest" theory of choice of law enunciated in *Tooker* v. *Lopez*, 24 N.Y.2d 569, 301 N.Y.S.2d 519, 249 N.E.2d 394 (1969), because Florida has the paramount interest in defining and enforcing fiduciary obligations owing to corporations incorporated and doing business within its borders. Accord-

ingly, I find that under any conceivable test, a New York court would apply Florida law to this case.

Under present Florida case law, a plaintiff in a derivative action must prove that the corporation has been damaged by the alleged breach of fiduciary trust. Although the highest court in that state has apparently not considered the matter, several District Courts of Appeal have held on various occasions that a complaint which fails ". . . to indicate both wrongful acts and damage to the corporation" must be dismissed. *Palma* v. *Zerbey,* 189 So. 2d 510, 511 (Fla.App., 1966), cert. denied 200 So.2d 814. (and cases cited therein.)

While it is apparently required that the damage to a corporation be alleged, the Florida cases shed no light on the specificity required for pleading corporate damage. Thus, though the Gildenhorn and Gregorio complaints might be insufficient under Florida law for failing to allege any damage to the corporation at all, the Schein complaint, which contains only a bare allegation that Lum's was damaged, might conceivably be held to be sufficient by a Florida court. Furthermore, I am not unmindful of the possibility that, were a Florida court to hear this case, *Diamond* v. *Oreamuno, supra.,* would be argued to it. Because of the possibility that the *Diamond* rationale might be followed in Florida, it is desirable that this court determine whether these complaints state a claim under *Diamond* for which relief can be granted.

It is clear that the complaints in these actions go far beyond the narrow holding of *Diamond.* In that case, the New York Court of Appeals held that a corporate fiduciary is liable for profits which he realizes from a sale of stock motivated by inside information received by him in his corporate position. None of the defendants in these actions fit into this mold. Chasen, as president and chief operating officer of Lum's, was certainly a fiduciary of that corpo-

ration. None of the complaints, however, allege that he did anything more than pass the inside information to defendant Simon, and there are no allegations that Chasen sold any of his Lum's stock or derived any gain, monetary or otherwise, from the sales that ultimately occurred. On the other hand, the mutual fund defendants would have profited if, as alleged, they sold their 83,000 shares of Lum's stock on the basis of Chasen's inside information. It can scarcely be maintained, however, that the mutual fund defendants were officers or directors of Lum's or owed any fiduciary duties whatsoever to that corporation. The broker-dealer defendants fail to come within either of the *Diamond* perimeters as they were not fiduciaries of the corporation and, did not profit by virtue of the sales.

Plaintiffs, of course, urge a more expansive view of *Diamond*. They point to portions of the opinion indicating that the purpose of the holding was to protect the corporation's interest in ". . . maintaining a reputation of integrity, an image of probity, for its management and in insuring the continued public acceptance and marketability of its stock." *Diamond* v. *Oreamuno, supra,* at 499, 301 N.Y.S.2d at 82, 248 N.E.2d at 912. Thus, say plaintiffs, if the purpose of *Diamond* is to maintain a corporation's integrity on the securities exchanges, it should make no difference whether an officer or director sells his own stock or passes the inside information to others who in turn sell their stock and profit thereby. While the harm done to the corporation might be equal in either instance, there is evidence that *Diamond* was not intended to cover the latter situation. As Chief Judge Fuld explained, the purpose of that derivative action was to allow individual shareholders to be ". . . 'private Attorney General[s]' to . . . enforce proper behavior on the part of corporate officials." *Diamond* v. *Oreamuno, supra,* at 503, 301 N.Y.S.2d at 85, 248

N.E.2d at 915. It is implicit that the jurisdiction of these "private attorney generals" would be limited to the corporation in which they are shareholders. It could not, with any logic, be extended in a derivative action to cover outside individuals, corporations, or institutions who are subject to other private and governmental restraints on their behavior. Furthermore, in affirming the dismissal of the *Diamond* complaint against other board members who were alleged to have aided the defendants in concealing their activities, the New York Court of Appeals made it quite clear that *Diamond* extends only to corporate fiduciaries who actually profit by inside information and does not cover aiders and abettors and/or conspirators. In view of the fact that the New York Court of Appeals could not bring itself to find liability for inter-corporate conspirators, I fail to perceive how this court could extend *Diamond* to cover extra-corporate conspirators and tippees. Accordingly, I conclude that with regard to all defendants save Chasen, the complaints herein fail to state a claim for which relief can be granted.

On the other hand, Chasen, as a corporate officer, might well come within the *Diamond* holding. Although it could be plausibly argued that *Diamond* would not apply to Chasen because of the failure to allege that he sold any stock and profited thereby, it might also be maintained that a New York court could find liability in light of the numerous statements in *Diamond* to the effect that the purpose of the holding is to prevent corporate misfeasance. This question, however, need not be reached because service of process upon Chasen was improper.

In diversity actions, this court's jurisdiction is determined by the law of the State of New York. Rule 4(d)(7), F.R.Civ.P. Because Chasen is not a New York resident and was not served in New York, jurisdiction of his person depends on the New York long-arm statute, CPLR

§ 302(a). It is plaintiffs' assertion that jurisdiction was obtained over Chasen because he set in motion events which culminated with the alleged sale of 83,000 shares of Lum's stock over an exchange located in New York. While I am aware that the scope of CPLR § 302(a) has been broadly construed, I fail to see how it can be read to cover the facts in this case.

While it is settled that one can "transact business" within the meaning of CPLR § 302(a) (1) through an agent, *Parke-Bernet Galleries, Inc.* v. *Franklyn,* 26 N.Y.2d 13, 308 N.Y.S.2d 337, 256 N.E.2d 506 (1970), a New York court would decline jurisdiction of a defendant who merely telephones a single order from outside the state. *Katz & Son Billiard Prods.* v. *Correale & Sons,* 20 N.Y.2d 903, 285 N.Y.S.2d 871, 232 N.E.2d 864 (1967). It seems obvious that Chasen, who did not place the order to sell the Lum's stock in question, did not "purposefully" avail himself "of the privilege of conducting activities" within New York, thereby "invoking the benefits and protections of its laws." *Hanson* v. *Denckla,* 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283 (1958).

Plaintiffs next argue that the sale of stock over a national exchange in New York was a "tortious act within the state" and that jurisdiction could be found under CPLR § 302(a) (2). While such a sale will confer jurisdiction in some cases, *Cooper* v. *North Jersey Trust Co. of Ridgewood, New Jersey,* 250 F.Supp. 237 (S.D.N.Y., 1965), CPLR § 302(a) (2) can apply only where the non-resident defendant committed the tort in New York. That the alleged tort here may have been completed or "came to rest" in New York will not confer jurisdiction unless the acts or omissions complained of also occurred in New York. *Feathers* v. *McLucas,* 15 N.Y.2d 443, 261 N.Y.S.2d 8, 209 N.E.2d 68 (1965). *Cooper* v. *North Jersey Trust Co. etc.,*

supra, is not inconsistent as the defendants in that case were physically in New York when they allegedly committed the tort there in issue. As it is nowhere alleged that Chasen committed a tortious act in New York, no jurisdiction of his person can be claimed under CPLR § 302(a) (2).

Finally, there can be no jurisdiction under CPLR § 302(a) (3). As the statute clearly states, the tortious act must cause injury to persons or property in New York. Insofar as none of the non-resident plaintiffs in these cases have alleged that any injury occurred in New York, their invocation of this provision is futile.

Defendant Chasen's motion to dismiss is granted on the ground that no jurisdiction was ever obtained of his person. Rule 12(b) (2) F.R.Civ.P. The motions of the remaining defendants to dismiss under Rule 12(b) (6) F.R.Civ.P. are hereby granted. In view of these rulings, defendants' alternative motion for a stay of these actions need not be reached.

Settle orders accordingly.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

70 Civil 5733 HRT

JOSEPH GILDENHORN, as Custodian for CAROL ANN GILDENHORN,

Plaintiff,

against

LUM'S INC., *et al.,*

Defendants.

71 Civil 1925 HRT

ANTONE F. GREGORIO,

Plaintiff,

against

LUM'S, INC., *et al.,*

Defendants.

71 Civil 4218 HRT

JACOB SCHEIN and MARVIN H. SCHEIN,

Plaintiff,

against

MELVIN CHASEN, *et al.,*

Defendants.

Defendants Investors Diversified Services, Inc., IDS New Dimensions Fund, Inc., and Investors Variable Payment

Fund, Inc., having moved to dismiss the complaints and the amended complaint in the above entitled actions under Rule 12(b) of the Federal Rules of Civil Procedure and the defendants Benjamin Simon, Lehman Brothers, Lum's, Inc., and Melvin Chasen having joined in said motion and said motions having come on to be heard before the Honorable Harold R. Tyler, United States District Judge, on November 19, 1971, and the Court having considered the papers submitted on said motions, having heard argument of counsel, and having issued an Opinion dated December 15, 1971 granting said motions, it is hereby

ORDERED that the above entitled actions be and they hereby are dismissed with prejudice, and without costs.

Dated: New York, New York
January 5, 1972

H. R. TYLER, JR.
U.S.D.J.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 81 and 82—September Term, 1972.

(Argued October 17, 1972 Decided May 10, 1973)

Docket Nos. 72-1373, 72-1375

JACOB SCHEIN and MARVIN H. SCHEIN,

Plaintiffs-Appellants,

v.

MELVIN CHASEN, INVESTORS DIVERSIFIED SERVICES, INC., LEHMAN BROTHERS, INVESTORS VARIABLE PAYMENT FUND, INC., BENJAMIN SIMON, IDS NEW DIMENSIONS FUND, INC., EUGENE S. SIT, JAMES R. JUNDT, and LUM'S, INC.,

Defendants-Appellees.

ANTONE F. GREGORIO, individually and as representative of all persons similarly situated as a class under Rule 23, F.R.C.P.,

Plaintiff-Appellant,

v.

LUM'S, INC., MELVIN CHASEN, LEHMAN BROTHERS, BENJAMIN SIMON, INVESTORS DIVERSIFIED SERVICES, INC., EUGENE S. SIT, and JAMES R. JUNDT,

Defendants-Appellees.

Before:

WATERMAN, SMITH and KAUFMAN,

Circuit Judges.

Invoking the diversity jurisdiction of the court, plaintiffs in three cases consolidated below sued derivatively in United States District Court for the Southern District of New York, Tyler, *J.*, alleging that defendants were jointly and severally liable under state corporation law for the profits realized by the defendants Mutual Funds through their trading on the New York Stock Exchange in derivative defendant's stock on the basis of non-public material inside information. An order granting summary judgment was granted to defendants and in two of the consolidated actions the parties have argued appeals.

Reversed and remanded for further proceedings consistent with this opinion.

WATERMAN, *Circuit Judge:*

Plaintiffs-appellants are stockholders in Lum's, Inc., a Florida corporation primarily engaged in restaurant franchising. Invoking the diversity jurisdiction of the court, they sued derivatively in the Southern District of New York alleging that the defendants were jointly and severally liable to Lum's for actionable wrongs which the defendants had committed against Lum's. The individual defendants were Melvin Chasen, a resident of Florida, president of Lum's, Benjamin Simon, a stockbroker employed in Chicago, Ill. by defendant Lehman Brothers, Eugene S. Sit, portfolio manager of defendant IDS New Dimensions Fund, Inc., a Mutual Fund, and James R. Jundt, manager of defendant Investors Variable Payment Fund., Inc., a Mutual Fund. Each of the four individual defendants moved for dismissal on the ground that they had not been validly served under the New York Long Arm Statute (CPLR §§ 313, 302(a)) and that the court below had no personal jurisdiction of them. Sit's and Jundt's motions were granted prior to the filing of the

order appealed from, Chasen's was granted concurrently therewith, and Simon's has apparently not been acted upon.[1] The defendants Lehman Brothers, a partnership engaged in stock brokerage and investment counseling, the three corporations, engaged in managing investment portfolios and in buying and selling the corporate securities of publicly held corporations, Chasen, and Simon, all moved for dismissal on the ground that the complaints failed to state a cause of action under Florida law. Plaintiffs claimed that New York law should govern the rights and liabilities of the parties, and that even if Florida law were the applicable law they should still prevail. Holding that Florida law was the proper state law to apply, Judge Harold R. Tyler, Jr., by written order, *sub nom Gildenhorn* v. *Lum's, Inc.,* opinion reported at 335 F.Supp. 329 (SDNY 1971), granted the motion to dismiss for failure to state a claim upon which relief could be granted.

On this appeal plaintiffs claim only that Judge Tyler erred in dismissing the complaints for failure to state a cause of action.[2] They do not appeal Judge Tyler's order dismissing Chasen as a defendant or his finding that the substantive law of Florida governs the action.[3] Inasmuch

[1] Plaintiffs-appellants have not appealed the order dismissing the actions against Chasen, Sit and Jundt. Simon filed a similar dismissal motion but the trial court did not decide it. Simon was dismissed as a defendant by the court's order dismissing the complaints against all defendants for failure to state a cause of action under 12(b)(6) of the Fed. R. Civ. P. Simon contends on this appeal that irrespective of our action on the lower court's dismissal of the complaints under 12(b)(6), we should dismiss the action against him because he has not been validly served. However, inasmuch as the trial court has not reached this question, we decline to address it on this appeal, and leave its resolution to the trial court upon remand.

[2] In one of the original actions consolidated below, *Gildenhorn* v. *Lum's, Inc.,* 335 F.Supp. 329 (SDNY 1971) a notice of appeal was filed by plaintiff but the parties have not progressed the appeal.

[3] The parties now agree that the substantive law of the State of Florida governs the action for reasons which are stated in Judge Tyler's opinion reported at 335 F.Supp. 329 (SDNY 1971).

as the court is passing only upon the sufficiency of the complaints, we necessarily accept the allegations of the complaints as true. For reasons which follow, we hold that the complaints do state a cause of action and we reverse the judgment below and remand to the district court for further proceedings there in the light of this holding.

The facts alleged in this case fall within the perimeter of the much-discussed problem of unfair trading in corporate securities. In November of 1969 Chasen, who was president and chief operating officer of Lum's addressed a seminar of about sixty members of the securities industry with reference to Lum's earnings prospects for its fiscal year ending July 31, 1970. He informed them that Lum's earnings would be approximately $1.00 to $1.10 per share. On January 5, 1970 he learned that this estimate was too optimistic and that, in fact, Lum's earnings would be only approximately $.76 per share. Three days later, prior to announcing the information to the public, Chasen telephoned Simon in Chicago and told Simon that Lum's would not have as profitable a year as had been expected. He specified to Simon that earnings would be approximately $.76 per share rather than the $1.00 per share which he had earlier announced. Simon knew the information was confidential corporate property which Chasen had not given out publicly. Simon immediately telephoned this information to Sit, an employee of defendant Investors Diversified Services, Inc. (IDS),[4] and Sit immediately telephoned it to Jundt, another employee of IDS. Sit and Jundt managed the stock portfolios of defendant mutual funds Investors Variable Payment Fund, Inc. (Investors) and IDS New Dimensions Fund, Inc. (Dimensions). Upon receiving the

[4] Defendant IDS is a Minnesota corporation licensed to do business in the State of New York. IDS is the distributor and investment advisor for a number of large mutual funds including defendants Investors and Dimensions. Sit and Jundt are employed by IDS to manage the stock portfolios of Investors and Dimensions.

information Sit and Jundt directed the Funds to sell their entire stock holdings in Lum's and, on the morning of January 9, 1970, prior to any public announcement, Investors sold 43,000 shares of Lum's and Dimensions sold 40,000 shares. The sales were executed on the New York Stock Exchange at about 10:30 A.M. at a price of approximately $17.50 per share. At 1:30 P.M. on the same day, the New York Stock Exchange halted further trading in Lum's stock pending a company announcement. At 2:45 P.M. Lum's issued a release which appeared on the Dow Jones News Wire Service and announced that the corporation's projected earnings would be lower than had been anticipated. When trading in Lum's was resumed on Monday, January 12, 1970, volume was heavy and the stock closed at a price of $14.00 per share—$3.50 per share lower than the Funds had realized from the sales of their shares on the previous Friday.

The present defendants in this case are Lehman Brothers, Simon, and the two Mutual Funds. Chasen, Sit, and Jundt have been dismissed as defendants in that they have not been validly served under the New York State Long Arm Statute. Plaintiffs-appellants' theory of recovery is that the participants in this chain of wrongdoing are jointly and severally liable to the corporation under Florida law for misusing corporate information to their own advantage in violation of the duty they owed to Lum's, and that they must account to Lum's for the profits realized by the Mutual Funds. They do not allege in these complaints that defendants have violated any of the federal securities laws,[5] and they concede that the substantive law

[5] Lum's could apparently not prevail as a plaintiff in a Rule 10b-5 action in that it has not traded in its securities on its own account. See *Birnbaum* v. *Newport Steel Corporation*, 193 F.2d 461 (2 Cir. 1952), cert. denied, 343 U.S. 956 (1952). Although there are federal securities law cases pending against defendants in district court, this fact is irrelevant upon this appeal.

of Florida governs the rights and liabilities of the parties. They urge, however, that inasmuch as there are no Florida cases directly in point, the Florida court, if it were deciding the case, would look to other jurisdictions and would take a particular and special interest in the decision of *Diamond* v. *Oreamuno,* 29 A.D.2d 285, 287 N.Y.S.2d 300 (1st Dep't 1968), *aff'd* 24 N.Y.2d 494, 301 N.Y.S.2d 78 (1969), a case which plaintiffs contend supports the position they urge on this appeal.

The first question which our court must consider is whether we may look to the New York decision of *Diamond, supra,* as persuasive authority. Ideally, the federal court sitting in a diversity action applies the applicable state law as it has been enunciated by the highest court in the state. *Erie R. Co.* v. *Tompkins,* 304 U.S. 64 (1938); *Hausman* v. *Buckley,* 299 F.2d 696 (2 Cir. 1962), *cert. denied,* 369 U.S. 885 (1962). However, in the absence of a clearly enunciated state rule, the federal court may turn to the law of other jurisdictions for assistance in determining how the state court would most likely decide the case if the state court were presented with the questions being litigated in the federal court. *Baxter* v. *Lancer Industries, Inc.,* 213 F.Supp. 92 (EDNY 1963), *app. denied,* 324 F.2d 286 (2 Cir. 1963); *Locke Manufacturing Companies* v. *United States,* 237 F.Supp. 80 (D. Conn. 1964). Our foray into the state law of Florida satisfies us that the Florida court has never faced the precise issues which are present in this action. Accordingly, it is both proper and practical for this court to turn for guidance to the body of law of other jurisdictions and particularly to that of New York where the resolution of the issues in the *Diamond* case, decided by the New York Court of Appeals, bears on the issues in the case before us. In doing so, our objective is to interpret *Diamond* as the Florida court would probably interpret it and

to apply *Diamond,* as so interpreted, to the facts presented here.

Diamond v. *Oreamuno, supra,* was a stockholder's derivative action in which a shareholder of Management Assistance, Inc. (MAI) charged that two of the defendants—Oreamuno, chairman of the board of directors, and Gonzales, its president and a member of the board, had used inside information acquired by them solely by virtue of their positions with MAI in order to reap large personal profits from the sale of MAI shares, and that these profits rightfully belonged to the corporation. Chief Judge Stanley Fuld, writing for a unanimous court, held that the two directors must account to the corporation for their profits for they had breached their duty to the corporation by using a corporate asset for their own personal advantage.

In this case we are asked to decide whether the *Diamond* holding should extend to reach third parties who, though not officers or directors of the injured corporation, are involved with directors in a common enterprise to misuse confidential corporate information for their own enrichment. Although there is no allegation in the complaints that a prior explicit agreement existed between Chasen and the defendants, it is obvious that the sequence of events detailed in the pleadings, if proved, will substantiate the existence of a common enterprise pursuant to which Chasen was to pass material information to Simon, Simon was to pass it to the Mutual Funds, and the Funds were to capitalize on it by selling Lum's stock prior to the time the material information was announced to and was available to the public. Cf. *American Tobacco Co.* v. *United States,* 328 U.S. 781 (1946); *Interstate Circuit, Inc.* v. *United States,* 306 U.S. 208 (1939); *Norfolk Monument Company* v. *Woodlawn Memorial Gardens, Inc.,* 394 U.S. 700 (1969). Although defendants do not deny that they have been involved in a joint enterprise with Chasen to misuse corpo-

rate property, they argue that the doctrine of *Diamond* is not applicable here and that they cannot be held liable to Lum's because they are not Lum's fiduciaries and have not breached any duty which they owed to Lum's by cashing in on confidential information for their own advantage. Defendants Simon and Lehman Brothers make the further argument that it would be "unfair" to hold them responsible for the profits made by the Mutual Funds in that they (Simon and Lehman Brothers) did not profit personally inasmuch as neither of them traded in Lum's stock.

As a court of equity viewing the case as the Florida court would probably view it, we cannot agree that the "stretch" of *Diamond* does not reach the defendants in this case. We find nothing in the language of *Diamond* to suggest that co-venturers of the director who breaches his duty should not be subject to the same liabilities as those of the director himself for the misuse of corporate information.[6] Indeed, the general rule has always been that "one who knowingly participates in or joins in an enterprise whereby a violation of a fiduciary obligation is effected is liable jointly and severally with the recreant fiduciary." *Oil & Gas Ventures—First 1958 Fund Ltd.* v. *Kung,* 250 F.Supp. 744 (1966); see, *e.g., Jackson* v. *Smith,* 254 U.S. 586, 589 (1921); *Sexton* v. *Sword S.S. Line Inc.,* 118 F.2d 708, 711 (2 Cir. 1941); *Bankers Life and Casualty Co.* v. *Kirtley,* 338 F.2d 1006, 1013 (8 Cir. 1964). If the *Diamond* court had intended to lay down an exception to this well-

[6] We believe Judge Tyler erred in attaching dispositive significance to the fact that in *Diamond,* supra, the complaint was dismissed against certain directors who had only "acquiesced" in the wrong. The defendants-appellees here differ from the dismissed *Diamond* defendants in that the defendants-appellees were actively engaged in furthering the transaction that resulted in the "dumping" of the Lum's stock, rather than just "acquiescing" in it. Furthermore, and even more importantly, *Diamond* was not a "joint venture" case, and there is no discussion in the *Diamond* opinion as to why the complaint was dismissed against the "acquiescing" directors.

known general rule it could have done so in its opinion. Moreover, in the light of the corporate interest which the *Diamond* rule is designed to protect, it is immaterial to the preservation of that interest whether the director trades on his own account in the corporation's stock or whether he passes on the information to outsiders who then trade in the corporation's stock. In either event, so long as the director is involved, the prestige and good will of the corporation may be tarnished by the public revelation that the director has been involved in unethical conduct. *Diamond, supra* at 499; accord, *S.E.C.* v. *Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1308 (2 Cir. 1971), *cert. denied*, 404 U.S. 1005, *reh. denied*, 404 U.S. 1064 (1972). Accordingly, it would be self-defeating to limit the reach of *Diamond* to directors and officers of the injured corporation who have so acted while permitting third-party co-venturers of theirs to escape liability to the corporation.

Diamond, the law of the jurisdiction in which the New York Stock Exchange is seated, has the prophylactic effect of providing a disincentive to insider trading. It is clear that this cleansing effect ought to reach third parties who, through a breach of a fiduciary relationship, become traders advantageously possessed of confidental insider knowledge. To immunize such third parties from liability to the damaged corporation would encourage insider "leaks" to outside friends and would defeat *Diamond's* purpose and effect. And, quite properly, damages for fiduciary breaches are recoverable by recourse to state law. Indeed, though the congressional policy is similar, in some cases where federal private and governmental Rule 10b-5 actions are impractical, "immunized outsiders" might escape liability altogether except for the availability of this kind of action bottomed upon the well-recognized liability of a fiduciary to those whose trust in the fiduciary has been tragically

misplaced. In view of the strong desirability of tightening the law of insider trading, we would be remiss indeed if we interpreted *Diamond* as narrowly as defendants would have us interpret it. Moreover, sitting as a court of equity, we have here an obligation to determine where the equities lie among all the litigants, *Diamond, supra* at 498, and, as between the defendants and Lum's, there can be no doubt that it would be inequitable to permit the defendants to keep the rewards of the fraud.[7]

Our view that all the participants in the common enterprise must assume the same risks of liability to the corporation as the offending director is supported by Florida case law dealing with the duty of a fiduciary to his cestui. The Florida courts have held that the duty of a fiduciary not to misuse the property of his cestui extends not only to the "technical fiduciary" but also to others who are placed in a position of trust. *Quinn* v. *Phipps*, 93 Fla. 805, 113 So. 419 (1927). The confidential relationship of a fiduciary as that relationship is spelled out in Florida law extends not only to "technical fiduciaries" but also to others who become "fiduciaries" through the acquisition of confidential information which is "owned" by someone else. See *Quinn* v. *Phipps, supra* at 420-421. When the defendants received their "tip" from Chasen, they were automatically clothed with a duty to Lum's not to use the information for their own selfish advantages. Compare *Brophy* v. *Cities Service Co.*, 31 Del. Ch. 241, 70 A.2d 5 (1949); *Ohio Oil Co.* v. *Sharp*, 135 F.2d 303 (10 Cir. 1943).

[7] This principle has been applied in analogous cases involving violations of the federal securities laws. In more than one instance, the corporation whose stock has been illegally traded has been permitted to recover conditionally in a Rule 10b-5 action because it is more equitable for it to recoup the rewards of the fraud than for the insider who profits by misusing corporate information to keep them. See *Securities and Exchange Commission* v. *Texas Gulf Sulphur*, 446 F.2d at 1308; *S.E.C.* v. *Golconda Mining Company*, 327 F.Supp. 257 (SDNY 1971).

This is firmly grounded in law and the rule is set forth in the American Law Institute's Restatement of Agency 2d § 312 (1958): "A person who, without being privileged to do so, intentionally causes or assists an agent to violate a duty to his principal is subject to liability to the principal." And see Comment c to § 312:

> A person who, with notice that an agent is thereby violating his duty to his principal, receives confidential information from the agent, may be enjoined from disclosing it and required to hold profits received by its use as a constructive trustee. * * * *

Therefore, if plaintiffs can prove their allegations, it would seem that liability of the Mutual Funds to Lum's must necessarily follow. Be that as it may be, however, the defendants Lehman Brothers and Simon contend that it would be inequitable to apply the rule to them because they did not personally profit by trading in Lum's stock and they hold no profits as constructive trustees of that corporation. Nevertheless, Lehman Brothers and Simon obviously misused inside information as much as Diversified and Investors misused it, and therefore we fail to see how equity would be furthered by imposing liability only on the Funds and not on the other participants who supplied the Funds with the inside information. It is well established that the liabilities of persons engaged in a joint enterprise to commit a wrong are both joint and several liabilities and each participant is liable to account for the profits of the other participants. *Marcus* v. *Otis,* 168 F.2d 649 (2 Cir. 1948), *modified,* 169 F.2d 148 (2 Cir. 1948); *Solomon* v. *United States,* 276 F.2d 669 (6 Cir. 1960), *cert. denied,* 364 U.S. 890 (1960), *reh. denied,* 364 U.S. 939 (1961). Accordingly, we hold that it would be proper to hold Lehman Brothers and Simon just as accountable for

the profits made by their tippees Diversified and Investors as the tippees themselves.[8]

Defendants also contend that the complaints are presently insufficient because they fail to allege with sufficient particularity the damages Lum's is claimed to have suffered. This contention is without merit. Although the Gregorio complaint fails to allege any damages to Lum's, the Schein complaint contains a general allegation of damages, and we find nothing in Florida law to require anything more than a general ad damnum allegation.[9]

Defendants also urge that inasmuch as there are private Rule 10b-5 class actions for damages, *e.g., Sanders* v. *Lum's, Inc., et al.,* 70 Civ. 5331 (SDNY) and an administratve suit brought by the Securities and Exchange Commission, *SEC* v. *Lum's, et al.,* 70 Civ. 5280 (SDNY), pending in federal district court, defendants might be subjected to multiple liability if they are forced to remit to Lum's the profits the Mutual Funds made on their January 9 sales. Since appel-

[8] In passing we note decisions dealing with violations of the federal securities laws which involve the imposition of liability on defendants who have occupied statuses similar to the statuses occupied by defendants in this case. Thus, in *Securities and Exchange Commission* v. *Texas Gulf Sulphur,* 446 F.2d at 1308, the same argument raised by Simon and by Lehman Brothers was raised by defendant Darke. This court held that Darke was liable as a tippor for the profits realized by his tippees. Furthermore, "tippee liability," which is analogous to the liability being imposed upon Diversified and Investors, has been established in federal cases involving violations of the securities laws. See *Ross* v. *Licht,* 263 F.Supp. 395 (SDNY 1967); *In the Matter of Cady, Roberts & Co.,* 40 S.E.C. 907 (1961).

[9] We find it unnecessary to decide whether the defendants could prevail if ***neither*** complaint alleged damages to Lum's. We point out, however, that Florida law is not clear on the question and *Diamond* holds specifically that an allegation of damages is not a prerequisite to a recovery. *Diamond* v. *Oreamuno, supra* at 499. The case cited by defendants for the proposition that damages must be alleged (*Palma* v. *Zerbey,* 189 So.2d 510 (Fla.App. 1966), cert. denied, 200 So.2d 814 (Fla. 1967)) is a one paragraph per curiam opinion of a lower Florida court, the Florida District Court of Appeals which, inasmuch as it fails to provide a discussion of the issues, we find to be totally unpersuasive.

lees are fully aware of these federal court actions they are well able to protect themselves from multiple liability.[10]

Preventing those who are privy to confidential inside information from using it to their own advantage has found expression in numerous cases in the federal courts dealing with violations of the federal securities laws. See *Securities and Exchange Commission* v. *Texas Gulf Sulphur,* 401 F.2d 833 (2 Cir. 1968), *cert. denied sub nom. Coates* v. *SEC,* 394 U.S. 976 (1969); *List* v. *Fashion Park, Inc.,* 340 F.2d 457 (2 Cir. 1965), *cert. denied,* 382 U.S. 811 (1965); *Wohl* v. *Blair & Co.,* 50 F.R.D. 89 (SDNY 1970); *Ross* v. *Licht,* 263 F.Supp. 395 (SDNY 1967); *Speed* v. *Transamerica Corp.,* 99 F.Supp. 808, 828-829 (D.Del. 1951), *aff'd* 235 F.2d 369 (3 Cir. 1956).

Accordingly, as to those persons found to be within the jurisdiction of the court, we reverse the order appealed from and remand the case for such further proceedings below as may be consistent with the contents of this opinion.

KAUFMAN, *Circuit Judge* (dissenting):

In my view, it is no longer debatable that trading on inside information merits universal condemnation.[1] The undesirable nature of "insider trading" is reflected in the prophylactic provisions of Section 16(b) of the Securities Exchange Act of 1934 and the more general antifraud principles of Section 10b of that Act. I fully agree with Judges Waterman and Smith that one with access to material inside information concerning a corporation's affairs who

[10] See, for example, the method employed in *Securities and Exchange Commission* v. *Texas Gulf Sulphur Co.,* 312 F.Supp. 77, 93 (SDNY 1970), *aff'd in part, rev'd in part,* 446 F.2d 1301 (2 Cir. 1971), cert. denied, 404 U.S. 1005 (1971), reh. denied, 404 U.S. 1064 (1971).

[1] But for a contrary view, *see* H. Manne, Insider Trading and the Stock Market (1966).

knowingly purchases or sells that corporation's shares before this information has become publicly available takes unfair advantage of unknowledgeable parties to the transaction. Indeed, the factual claims contained in the complaints before us have led to two federal actions—an SEC injunctive action and a private class action under rule 10b-5—now pending in the District Court for the Southern District of New York. But the adage that hard facts make bad law is about to come true here, despite Judge, later Justice, Cardozo's warning that judges are not free agents roaming at will to create law to fit the facts. *See* The Nature of the Judicial Process 141 (1921). In the absence of any viable precedent upon which to base the totally new concept of law espoused by my brothers, it is clear that they announce an extraordinary, expansive, and incorrect reading of New York law solely because of their urge to "provid[e] a disincentive to insider trading." I agree with their objective but I question the means employed.

The court holds today that a person with no relationship whatsoever—fiduciary or otherwise—to a corporation, who trades its shares on the basis of material inside information becomes, *ipso facto,* a fiduciary of the corporation whose shares he traded and, accordingly, may be required in a *shareholders' derivative action*—not a Section 10(b) or 16(b) action—to pay his profits to the corporation. With all due respect to my brothers, the tortured reasoning to which they are compelled to resort in reaching this conclusion represents a distortion of the law of agency and the law of fiduciary responsibility in which I am unable to join. Accordingly, I dissent.

Stripped of excess verbiage, the complaints in the two consolidated stockholders' derivative actions before us make the following allegations. In January, 1970, Melvin Chasen, president of Lum's, learned that an earnings estimate of between $1.00 and $1.10 per share previously released to the

financial community was grossly inaccurate. A more realistic figure was $.76 per share. Chasen revealed this information on January 8, during a telephone conversation, to Benjamin Simon, an employee in Lehman Brothers Chicago office. Simon, in turn, disclosed the adverse news to Eugene Sit, portfolio manager of Investors Variable Payment Fund, Inc., who himself conveyed the information to James Jundt, portfolio manager of IDS New Dimensions Fund, Inc. Both Sit and Jundt are employees of Investors Diversified Services, Inc. (IDS), investment adviser to the two mutual funds. During the morning of Friday, January 9, prior to any public disclosure of the reduced earnings figure, the two mutual funds sold a total of 83,000 shares of Lum's stock on the New York Stock Exchange at a price of approximately $17.50 per share. Later that day, after the Exchange halted trading in Lum's shares, Lum's publicly announced the reduced earnings forecast. Trading did not resume until the following Monday, when the closing price fell to $14.00 per share.

It is important to note at the outset that the plaintiffs in these actions, shareholders of Lum's, do not claim to have suffered any damages themselves. Rather, these derivative suits are brought "on behalf of and for the benefit of Lum's." They seek to recover for Lum's treasury the windfall profit garnered by the IDS mutual funds, and assert that all defendants are jointly and severally liable for this amount. Thus, the proper method of analysis is not to focus on the unfairness of the mutual funds' profit at the expense of their purchasers—who have their own recourse for any wrongdoing—but on the strands of duty running to the corporation from the various individuals involved. The crux of the majority's holding is that the institutional defendants—Lehman Brothers, IDS, and the two mutual funds—and their employees—Simon, Sit, and

Jundt—are within the sweep of fiduciary principles announced in *Diamond* v. *Oreamuno,* 24 N.Y.2d 494, 301 N.Y.S.2d 78 (1969). But a careful examination of that case and the principles underlying it demonstrate that *Diamond* is wholly inapposite to this case.

In *Diamond,* the New York Court of Appeals dealt with a derivative action brought by a shareholder of Management Assistance, Inc. (MAI) against Oreamuno, chairman of the board of directors of the corporation, and Gonzalez, its president. The complaint charged that by virtue of their corporate positions, these officers knew that a supplier's price increase had caused MAI's earnings to decrease by more than 75% during a one month period. According to the allegations, the two officers sold over 50,000 MAI shares at a price of $28 per share prior to public disclosure of the adverse earnings figures, after which the price per share plummeted to $11. In reviewing the Appellate Division's refusal to order dismissal of the complaint against Oreamuno and Gonzalez, Chief Judge Fuld stated at the outset that "the question presented—one of first impression in this court—is whether *officers and directors* may be held accountable to their corporation for gains realized by them from transactions in the company's stock as a result of their use of material inside information," 24 N.Y.2d at 496, 301 N.Y.S.2d at 79 (emphasis added). A careful reading of the *Diamond* opinion reveals that Oreamuno's and Gonzalez's liability in a stockholders' derivative action was grounded solely in their having breached a fiduciary duty owed by them to MAI as corporate officials.

The inapplicability of these principles to any of the appellees[2] is readily apparent. The complaints here are

[2] As noted in the majority opinion, the only defendants remaining on appeal are Lehman Brothers, IDS, the two mutual funds, and Simon. The district court dismissed the actions against Chasen for lack of personal jurisdiction, a holding not challenged on appeal. Accordingly, this court need not comment on the nature and extent of Chasen's liability to Lum's because of his conduct.

barren of any allegation that the appellees—or Sit or Jundt —occupied any position, such as officer, director, employee, or agent, which would create fiduciary obligations to Lum's. *Compare Brophy* v. *Cities Service Co.*, 31 Del. Ch. 241, 70 A.2d 5 (1949); *Quinn* v. *Phipps*, 93 Fla. 805, 113 So. 419 (1927). Liability in *Diamond* was predicated entirely on such a relationship, and in its absence, the *Diamond* rationale for liability ceases to exist.

In an effort to bridge this fatal gap, the majority, without any basis in law or fact, reasons that the appellees were involved in a "joint" or "common enterprise" with Chasen, president of Lum's, "to misuse confidential corporate information for their own enrichment." By use of this interesting, but nevertheless fictional, theory, they seek to foist upon the appellees liability to Lum's for Chasen's improper behavior. But the facts alleged in the complaints are a far cry from the "conscious parallelism" cases, drawn from the antitrust field, cited as authority in the majority opinion; the facts simply do not comport with the concept of a joint enterprise, a term which implies the existence of a prior plan to carry out a mutually beneficial project. The complaints, read in the most favorable light to the plaintiffs, disclose nothing more than a seemingly unsolicited and haphazard revelation of certain information which was useful in making investment decisions. There are ample remedies under the federal securities laws to punish this conduct. But, I am unable to understand on what basis the majority transforms the appellees' spontaneous conduct into a nefarious, prearranged, and ongoing scheme so that "joint" or "common enterprise" principles can make them liable as fiduciaries of a corporation with which they have no relationship.

A primary authority upon which the majority relies, § 312 of the American Law Institute's Restatement of

Agency 2d, exposes the inappropriateness of holding the appellees liable to Lum's for their conduct. Section 312 provides that "A person who, without being privileged to do so, intentionally causes or assists an agent to violate a duty to his principal is subject to liability to the principal." Although Comment *c* to this section speaks generally of receipt of confidential information by a third person from a principal's agent, the central element of liability is the third party's active and intentional aiding in the agent's violation of a duty owed to his principal. In this case, Chasen's duty to Lum's was to not disclose confidential corporate information. Yet there is not a word in the complaint charging that the appellees actively solicited the disclosure or that they had concocted a prearranged scheme with Chasen.[3] We are dealing here with an isolated transaction.

In the absence of any coherent legal theory, I cannot join my brothers in approving the use of the shareholders' derivative action device merely because, as my brothers candidly admit, to do so possibly may have a deterrent effect on "insider trading." Although developments in federal securities law indicate an expanding scope of liability for tippee traders, *see In re* Investors Management Co., Securities and Exchange Commission Release No. 34-9267 (Jul. 29, 1971) (SEC sanctioning of institutional investors

3. It is of no small significance that in the *Diamond* litigation, the Appellate Division affirmed dismissal of the complaint against other MAI directors—fiduciaries to the corporation—who allegedly "approved, acquiesced in or ratified" Oreamuno's and Gonzalez's transactions. 29 A.D.2d 285, 287 N.Y.S.2d 300 (1968). Despite the majority's effort in a footnote to "distinguish" this disposition, I believe the Appellate Division's action is clearly dispositive of the point before us. If the New York courts would not impose liability upon a director—a fiduciary of the corporation—who took no affirmative steps to cause or assist in a breach of a fiduciary duty by the corporation's president, I fail to see by what logic it can be urged that New York courts would hold liable a non-fiduciary who did not cause or assist in the breach.

who sold a corporation's shares after the corporation's underwriter revealed adverse earnings results to them); *cf. SEC* v. *Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1308 (2d Cir. 1971), *cert. denied*, 404 U.S. 1005 (1972) (affirming district court order, in SEC injunctive suit, requiring a "tippor" to divest an amount equal to his tippees' profits), the impetus for developing this expanded federal law liability—whose exact nature and scope remain in a formative stage— is the need to maintain free and honest securities markets. This need appropriately is given great weight when we consider claims under the federal securities law. But it is inapposite in determining whether, *under state common law*, tippee trading is a breach of a fiduciary duty owed to the corporation whose shares are traded, and if so, whether such a breach is remediable through use of a shareholders' derivative action.

In these actions, where jurisdiction is grounded solely in diversity of citizenship, the parties and the majority agree that our duty is to apply the law of Florida. Yet because there are no pertinent Florida decisions, the majority focuses on a New York decision, *Diamond* v. *Oreamuno*, *supra*. Thus, liability is founded on the conclusion of two federal judges that the Florida Supreme Court, if the instant case was before it, would look to a New York decision and, in addition, would give an unprecedented expansive reading to that case.

Despite the manner in which the majority opinion convolutes the law and the facts in this case, a view that a tippee is cloaked with state law fiduciary obligations to the corporation whose shares he trades is an unknown and untenable legal concept. Neither *Diamond*—itself a significant alteration of the common law principles applicable to

an officer's or director's trading in his corporation's shares[4] —nor the law of agency support such a holding. Nothing in the majority opinion tells us why or on what grounds a New York court would hold a tippee trader liable to the corporation for his profits under common law fiduciary principles, and the court exceeds its authority by substituting its own view of what state law ought to be, for what the state law actually is.

Moreover, since the outcome of this case turns, ultimately, upon Florida law, I fail to comprehend why my brothers refuse to utilize Florida's certified question statute, Fla. Stat. Ann. §25.031.[5] This enlightened law provides for certification to the Florida Supreme Court by a federal appellate court of an unresolved question of Florida law which is determinative of a case before it and on which there are no clear, controlling Florida Supreme Court precedents. The statute states that the court, by

4. *See* Note, 1970 Wis. L. Rev. 576, 577. Although not dispositive, this fact augurs against assuming the state courts could make the broad holding so readily attributed to them by the majority.

5. The supreme court of this state may, by rule of court provide that, when it shall appear to the supreme court of the United States, to any circuit court of appeals of the United States, or to the court of appeals of the District of Columbia, that there are involved in any proceeding before it questions or propositions of the laws of this state, which are determinative of the said cause, and there are no clear controlling precedents in the decisions of the supreme court of this state, such federal appellate court may certify such questions or propositions of the laws of this state to the supreme court of this state for instructions concerning such questions or propositions of state law, which certificate the supreme court of this state, by written opinion, may answer.

This statutory authority has been implemented by Appellate Rule 4.61.

written opinion, then may answer the certified question. *See Aldrich* v. *Aldrich*, 375 U.S. 249 (1963); *Green* v. *American Tobacco Co.*, 304 F. 2d 170 (5th Cir. 1962). The uncertainty inherent in the majority's speculation over what the Florida courts would decide if faced with this novel question of tippee liability under state common law fiduciary principles in a stockholders' derivative action would be dispelled authoritatively and finally.

Accordingly, I respectfully dissent.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of May, one thousand nine hundred and seventy-three.

Present—Hon. STERRY R. WATERMAN
Hon. J. JOSEPH SMITH
Hon. IRVING R. KAUFMAN, Circuit Judges.

72-1373—72-1375

JACOB SCHEIN and MARVIN H. SCHEIN,
Plaintiffs-Appellants,

v.

MELVIN CHASEN; INVESTORS DIVERSIFIED SERVICES, INC.; LEHMAN BROTHERS; INVESTORS VARIABLE PAYMENT FUND, INC.; BENJAMIN SIMON; IDS; NEW DIMENSIONS FUND, INC.; EUGENE C. SIT; JAMES R. JUNDT and LUM'S, INC.,
Defendants-Appellees.

ANTONE F. GREGORIO, individually and as representative of all persons similarly situated as a class under Rule 23 FRCP,
Plaintiff-Appellant,

v.

LUM'S INC., MELVIN CHASEN, LEHMAN BROTHERS, BENJAMIN SIMON, INVESTORS DIVERSIFIED SERVICES, INC., EUGENE C. SIT and JAMES R. JUNDT,
Defendants-Appellees.

Appeal from the United States District Court for the Southern district of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and that the action be and it hereby is remanded to said District Court for further precedings consistent with the opinion of this court with costs to be taxed against the appellees.

A. Daniel Fusaro
Clerk

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House in the City of New York, on the eighth day of June, one thousand nine hundred and seventy-three

JACOB SCHEIN and MARVIN H. SCHEIN,
Plaintiffs-Appellants,

v.

MELVIN CHASEN; INVESTORS DIVERSIFIED SERVICES, INC.; LEHMAN BROTHERS; INVESTORS VARIABLE PAYMENT FUND, INC.; BENJAMIN SIMON; IDS; NEW DIMENSIONS FUND, INC.; EUGENE S. SIT; JAMES R. JUNDT and LUM'S, INC.,
Defendants-Appellees.

ANTONE F. GREGORIO, individually and as representative of all persons similarly situated as a class under Rule 23 FRCP,
Plaintiff-Appellant,

v.

LUM'S INC., MELVIN CHASEN; LEHMAN BROTHERS; BENJAMIN SIMON; INVESTORS DIVERSIFIED SERVICES, INC.; EUGENE S. SIT and JAMES R. JUNDT,
Defendants-Appellees.

A petition for rehearing in banc having been filed herein by counsel for the Defendant-Appellee Benjamin Simon and no active circuit judge having requested that a vote be taken on said suggestion

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of June, one thousand nine hundred and seventy-three

JACOB SCHEIN and MARVIN H. SCHEIN,
Plaintiffs-Appellants,

v.

MELVIN CHASEN; INVESTORS DIVERSIFIED SERVICES, INC.; LEHMAN BROTHERS; INVESTORS VARIABLE PAYMENT FUND, INC.; BENJAMIN SIMON; IDS; NEW DIMENSIONS FUND, INC.; EUGENE S. SIT; JAMES R. JUNDT and LUM'S, INC.,
Defendants-Appellees.

ANTONE F. GREGORIO, individually and as representative of all persons similarly situated as a class under Rule 23 FRCP,
Plaintiff-Appellant,

v.

LUM'S INC., MELVIN CHASEN, LEHMAN BROTHERS, BENJAMIN SIMON, INVESTORS DIVERSIFIED SERVICES, INC., EUGENE S. SIT and JAMES R. JUNDT,
Defendants-Appellees,

A petition for rehearing in banc having been filed herein by counsel for the appellee Lehman Brothers and no active circuit judge having requested that a vote be taken on said suggestion

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Docket Nos. 72-1373, 72-1375

At a stated term of the United States Court of Appeals in and for the Second Circuit held at the United States Court House, in the City of New York on the eighteenth day of June, one thousand nine hundred and seventy-three.

Present: Hon. IRVING R. KAUFMAN
Hon. S. R. WATERMAN
Hon. J. JOSEPH SMITH, Circuit Judges.

JACOB SCHEIN and MARVIN H. SCHEIN,
Plaintiffs-Appellants,

v.

MELVIN CHASEN; INVESTORS DIVERSIFIED SERVICES, INC.; LEHMAN BROTHERS; INVESTORS VARIABLE PAYMENT FUND, INC.; BENJAMIN SIMON; IDS; NEW DIMENSIONS FUND, INC.; EUGENE S. SIT; JAMES R. JUNDT and LUM'S, INC.,
Defendants-Appellees.

ANTONE F. GREGORIO, individually and as representative of all persons similarly situated as a class under Rule 23 FRCP,
Plaintiff-Appellant,

v.

LUM'S, INC.; MELVIN CHASEN, LEHMAN BROTHERS; BENJAMIN SIMON; INVESTORS DIVERSIFIED SERVICES, INC.; EUGENE S. SIT; and JAMES R. JUNDT,
Defendants-Appellees.

A petition for a rehearing having been filed herein for counsel for the appellees Investors Diversified Services, Inc., Investors Variable Payment Fund, Inc., and IDS New Dimensions Fund, Inc.,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Docket Nos. 72-1373, 72-1375

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighteenth day of June, one thousand nine hundred and seventy-three,

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JACOB SCHEIN and MARVIN H. SCHEIN,
Plaintiffs-Appellants,

v.

MELVIN CHASEN; INVESTORS DIVERSIFIED SERVICES, INC.; LEHMAN BROTHERS; INVESTORS VARIABLE PAYMENT FUND, INC.; BENJAMIN SIMON; IDS; NEW DIMENSIONS FUND, INC.; EUGENE S. SIT; JAMES R. JUNDT and LUM'S, INC.,
Defendants-Appellees.

ANTONE F. GREGORIO, individually and as representative of all persons similarly situated as a class under Rule 23 FRCP,
Plaintiff-Appellant,

v.

LUM'S, INC.; MELVIN CHASEN, LEHMAN BROTHERS; BENJAMIN SIMON; INVESTORS DIVERSIFIED SERVICES, INC.; EUGENE S. SIT and JAMES R. JUNDT,
Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellees Investors Diversified Services, Inc., Investors Variable Payment Fund, Inc., and IDS New Dimensions Fund, Inc., and no active circuit judge having requested that a vote be taken on said suggestion.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO
Clerk